89- 1480

No. _____

In The

Supreme Court of the United States

October Term, 1989

MARGARET ANN DURAN,

Petitioner,

v.

STATE OF TEXAS, GEORGE S. BAYOUD, JR.,
Secretary of State of the State of Texas,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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March 19, 1990

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QUESTIONS PRESENTED

1. Does the failure of the Texas Supreme Court to issue a writ of mandamus directing the Texas Secretary of State to grant petitioner's application for a corporate charter violate petitioner's First Amendment rights to commercial speech when the corporate charter was applied for under a name truthfully describing the services petitioner intends to provide through that corporation?

2. Does the failure of the Texas Supreme Court to issue a writ of mandamus directing the Secretary of State of Texas to grant petitioner's application for a corporate charter under a trade name which truthfully describes the lawful services petitioner intends to provide through that corporation violate petitioner's right to that charter when the petitioner's application met all of the qualifications for a corporate charter, and the granting of said charter is a purely ministerial function of the Secretary of State?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Margaret Ann Duran and the Secretary of State for the State of Texas, an office now held by respondent George S. Bayoud, Jr. The respondents before this Court include the State of Texas.

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In The

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STATE OF TEXAS, GEORGE S. BAYOUD, JR.,
Secretary of State of the State of Texas,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The petitioner Margaret Ann Duran respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas, entered in the above entitled proceeding on November 8, 1989.

OPINIONS BELOW

The Supreme Court of Texas issued no opinion in the proceedings below. Petitioner was informed by letter dated December 18, 1989, to Francis G. Culhane, the attorney representing her in the proceedings below, that that court, on November 8, 1989 had denied her petition for

writ of mandamus. The letter to Attorney Culhane as well as the order of which it speaks are attached in the appendix, p. A-29 infra.

JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. 1257(a).

Because a petition for writ of mandamus to an official of the State of Texas must be initiated in the Supreme Court of Texas, there are no proceedings from courts below, other than the action of the Supreme Court of Texas in refusing to grant Ms. Duran's petition, an action taken without explanation by that Court.

STATEMENT OF THE CASE

Petitioner, Margaret A. Duran has substantial experience in the accounting field. She is attempting to establish an accounting practice in her home town of San Angelo, Texas.

On June 15, 1988, Ms. Duran mailed duplicate originals of the Articles of Incorporation of her intended corporation, "Duran's Accounting and Tax Service" to Mr. Jack M. Rains, then Secretary of State of Texas. (App., p. A-19) She enclosed with that application payments of all fees associated with an application for a corporate charter. (App., p. A-23)

On June 22, 1988, Ms. Duran received a reply to her application, dated June 20, 1988, from Mr. Rains. (App., p.

A-24-26) That reply informed Ms. Duran that her application was denied on the grounds that:

"You cannot have accounting in your corporate name it implies an unlaw (sic) purpose for a business corporation." (App., p. A-25)

Although the refusal of Mr. Rains to grant Ms. Duran's request for a corporate charter was not expressly stated as based on any statutory authority, that refusal must have been based on the Public Accountancy Act of 1979, Article 41a-1 Section 8. (App., p. A-29), prohibiting titles and trade names that inaccurately indicate licensed status.

The above language of Mr. Rains meant that Ms. Duran was not to include the word "accounting" in her corporate name because he believed that consumers would be misled by the word since Ms. Duran is not a certified public accountant (CPA).

Mr. Rains denied Ms. Duran's application despite the fact that her intended corporate name was completely truthful (Ms. Duran never claimed to be a CPA) and she had met all of the other conditions for receiving a corporate charter.

On October 18, 1989, Ms. Duran filed a petition in the Supreme Court of Texas requesting a writ of mandamus be issued directing Mr. George S. Bayoud, Jr., successor to Mr. Rains as Secretary of State of Texas, to issue the corporate charter for which she had applied. (App., p. A-2)

Ms. Duran's petition for writ of mandamus was denied by order dated November 8, 1989. (App., p. A-1) No order of the Court indicating such action was provided to Ms. Duran or her attorney until a certified copy of said

order, under cover of a letter dated December 18, 1989, was provided to her attorney. (App., p. A-28)

REASONS FOR GRANTING THE WRIT

I.

The failure of the Texas Supreme Court to issue a writ of mandamus directing the Secretary of State of Texas to grant petitioner's application for a corporate charter violates petitioner's First Amendment rights to commercial speech; the corporate charter was applied for under a name which truthfully describes the services petitioner intends to provide through that corporation, and there is no other apparent basis for denial of the charter by the State of Texas.

The Texas Secretary of State's restriction on Ms. Duran's chosen trade name, and his refusal to issue her a corporate charter under that name violate Ms. Duran's First Amendment rights to commercial speech, in contravention of the teachings of this Court. In particular, it is inconsistent with this Court's ruling in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

In *Central Hudson*, this court set forth a four-pronged test for determining whether certain commercial speech was due protection under the First Amendment.

> For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly

> advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.
>
> 477 U.S. at 566.

Presumably, the position of the State of Texas is that the use of the term "accountant" by a person who is not a CPA is misleading *per se* and therefore fails the first prong of the *Central Hudson* test. However, careful analysis suggests that this is not so. In fact, the Texas courts themselves have specifically defined the term "accountant" much more expansively than the definition of a Certified Public Accountant:

> "One engaged in rendering accounting or auditing service, . . . on a fee basis . . . but generally not possessing all the qualifications of education or experience required of a certified public accountant. . . ."

Texas State Board of Public Accountancy v. Fulcher, 515 S.W.2d 950, 956 (Tex. Civ. App. Corpus Christi, 1974).

Thus, anyone engaged in the above services or activities is engaged in "accounting" and is therefore an "accountant". So, the use of the term "accounting" or "accountant" by an unlicensed, or non-CPA accountant is not at all misleading. Therefore, Ms. Duran's selection of the term "accounting" for inclusion in her chosen trade name for her corporation was not misleading and not in violation of the first prong of the *Central Hudson* test.

Although the State of Texas has a strong governmental interest in protecting its citizens from misleading trade names, there is no misleading trade name here. Since no extraordinary governmental interest was asserted in barring Ms. Duran from use of her chosen trade

name, Ms. Duran's choice of a name for her intended corporation should be accorded the First Amendment protection of commercial speech that it is due.

Because there is no governmental interest at issue here, there is no such issue to evaluate concerning the question whether the governmental action in prohibiting Ms. Duran's commercial speech advances that governmental interest. Similarly, since there is no governmental interest at issue here, the Texas governmental action in prohibiting Ms. Duran's commercial speech was, perforce, more extensive than was necessary to serve that interest. Therefore, under the *Central Hudson* test, the Texas government violated Ms. Duran's First Amendment rights to protection of her commercial speech.

This Court first clearly extended First Amendment protection to purely commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 478 (1976). The "core notion of commercial speech" is "speech which does no more than propose a commercial transaction" according to *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 385 (1973) and other cases, although this does not exhaust the definition of commercial speech. The utilization of terms such as "accounting," "accounting services," and "accountant" – terms which accurately describe services non-CPA accountants may lawfully perform – clearly is intended to inform the public that these services may be obtained, for fees, from those using the terms. The message of such words is essentially the same as "I will sell you X drug at Y price" – words held to be constitutionally protected speech in *Virginia State Board of Pharmacy v.*

Virginia Citizens Consumer Council, Inc., supra. This Court has noted that the free flow of commercial speech is vital to the proper functioning of our nation's free enterprise system. *Virginia State Board of Pharmacy, supra,* 425 U.S. at 765; *Central Hudson Gas & Electric Corp. v. Public Service Com'n, supra.*[1] Prohibiting the flow of such information by forbidding non-CPA accountants to use the terms "accountant" will have the practical consequences not only of diverting at least some of the trade of those relatively more affluent consumers of accounting services who might prefer the services of non-CPA accountants to CPAs but also of keeping the small business operations that traditionally depend on the services of non-CPA accountants from obtaining any accounting services at all because of their inability to find them. One reason commercial speech was accorded the protection of the First Amendment was to avoid such consequences. See *Bates & O'Steen v. State Bar of Arizona,* 433 U.S. 350, 364 (1977); *Zauderer v. Office of Disciplinary Council,* 471 U.S. 626, 646 (1985).

Moreover, even when the use of a term in commercial speech has the potential to be used in a misleading manner, absolute prohibition is not a constitutionally accepted option "if the information may be presented in a way that is not deceptive." *In re R.M.J.,* 455 U.S. 191, 203. See also *Board of Trustees of the State Univ. of New York v. Fox,* 109 S. Ct. 3028, 3035 (1989). The total prohibition here

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[1] This vital role of commercial speech is surely the reason why the doctrine "has demonstrated remarkable vigor" despite its "relative infancy." See Tribe, *American Constitutional Law* 895 (2d ed. 1988).

of use of the term "accounting" by Ms. Duran clearly reaches well beyond any legitimate fear the state may have that non-CPA accountants will pass themselves off as CPAs. Such explicit misrepresentation would indeed justify action but there is no indication whatever that such assertions of licensed status have been made or are likely to be made by Ms. Duran. Even if there were such indication, that would justify only an appropriately limited approach. The mere use of the term "accountant" by one who may legally offer to the public services generally viewed as accounting by the public is not deceptive *per se;* efforts to label it as such infringe free speech rights. *Comprehensive Accounting Services v. Maryland,* 397 A.2d 1019 (Md. 1979).

By denying Ms. Duran's petition for a writ of mandamus directing the Secretary to grant her application for a corporate charter, the Texas Supreme Court failed to accord the proper First Amendment protection of commercial speech due to Ms. Duran.

II.

The failure of the Texas Supreme Court to issue a writ of mandamus directing the Texas Secretary of State to grant petitioner's application for a corporate charter under a trade name truthfully describing the lawful services petitioner intends to provide through that corporation, violates petitioner's right to that charter because the petitioner's application met all of the lawful qualifications for a corporate charter, and the granting of said charter therefore is a purely ministerial function of the Secretary of State.

In order to qualify for a corporate charter in Texas, an applicant must mail duplicate originals of the intended

corporation's Articles of Incorporation to the Texas Secretary of State (Secretary) and pay all required fees (e.g. filing fee, franchise tax deposit and the like).

The Secretary, through his Corporations Division, then reviews the application. Applications are answered with forms on which members of the Secretary's staff can mark conditions which must be met in order to qualify for the charter. There are also spaces to mark the reasons why an application may be denied. For example, a charter can be denied if another company is already chartered in the same name. A charter may be denied if the name does not reveal the corporate nature of the corporation. When a charter is denied or delayed for these or similar reasons, it appears that correction of any of these inadequacies will result in the issuance of the requested charter.

In this case, the Secretary denied Ms. Duran's application, stating that was unlawful for her to use the word "accounting" in her corporate name. Although no specific reason was noted for that prohibition, there can be no doubt that the Secretary's action was based on a construction of the meaning of the Public Accountancy Act of 1979, Article 41a-1 Section 8 (App., p. A-29), that petitioner believes is improper. As discussed, *supra*, Ms. Duran's use of the word "accounting" was not misleading since it does not in and of itself represent or suggest that she is a Certified Public Accountant.

In sum, Ms. Duran's charter should not have been denied on the grounds that she could not use the word "accounting" in her corporate name, and there were no other reasons to deny the charter. Therefore, the charter

must issue. Since the Secretary refused to issue said charter, the Texas Supreme Court should have granted a writ of mandamus directing that the Secretary grant Ms. Duran's application. *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803); *Ex Parte United States*, 242 U.S. 27 (1916).

Although mandamus may not be employed to direct an officer to exercise discretion in any particular manner, a writ may issue against an officer to command that officer to perform a ministerial duty. *Wilbur v. U.S. ex rel. Kadrie*, 281 U.S. 206 (1930). Texas law makes it clear that issuance of a corporate charter by the Secretary to qualified applicants is in no way discretionary. The Texas Secretary of State is empowered to administer that state's Business Corporation Act efficiently and to perform the duties that Act imposes on him. Art. 9.03.

Article 3.03 requires that the original and a copy of the articles of incorporation be delivered to the Secretary. That article then states that

> "If the Secretary of State finds that the articles of incorporation conform to law, he *shall*, when all fees have been paid as required by law: (emphasis added)
>
> . . .
>
> (3) Issue a certificate of incorporation to which he shall affix the copy.
>
> B. The certificate of incorporation, together with the copy of the articles of incorporation affixed thereto by the Secretary of State, *shall* be delivered to the incorporators or their representative." (emphasis added)

Since no discretion may be executed in the performance of a ministerial duty, a writ of mandamus must issue to command performance of that duty.

Petitioner's effort to obtain relief by seeking a writ of mandamus was appropriate because the action sought – the issuance of the corporate charter – is clearly within the authority and normal operation of the Texas Secretary of State, and there is no other plain, speedy and adequate remedy available to petitioner in the ordinary course of law to achieve the same end. *Cf. United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540 (1937).

In Texas, before mandamus may issue, three elements must coexist: (1) a clear right of plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy must be available. *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969), *cert denied*, 399 U.S. 941. Here, Ms. Duran is clearly entitled to the relief sought because she fulfilled all of the requirements for people obtaining a corporate charter for her intended business. The Secretary had a clear duty to grant Ms. Duran's application for a corporate charter because, under these circumstances, the Secretary's duty to issue the charter became mandatory.

The Texas Supreme Court failed in its clear duty to grant a writ of mandamus. There is no other adequate remedy available to Ms. Duran because Texas law requires that "[O]nly the Supreme Court has the authority to issue a writ of mandamus . . . against any of the officers of th[e] state . . . to compel the performance of a . . . ministerial act or duty that, by state law, the officer

or officers are required to perform." Tx. Stat. §22.002 (1987).

By refusing to issue a writ of mandamus directing the Secretary to grant Ms. Duran's application for a corporate charter, the Texas Supreme Court denied Ms. Duran, one who met all the lawful requirements for obtaining a charter, her right to that charter. The granting of corporate charters under such circumstances is a ministerial, not discretionary function of the Secretary. The refusal of the Texas Supreme Court to issue the writ of mandamus was improper as a matter of law – that action allowed the Secretary to exceed his authority and deny Ms. Duran the opportunity to obtain the necessary license to pursue a lawful business for which she fulfilled the legal requirements.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. The failure of the Texas Secretary of State to perform the ministerial act of granting petitioner's request for a corporate charter when petitioner met all the valid requirements for such a charter made seeking a writ of mandamus from the Texas Supreme Court the appropriate action. The failure of the Texas Supreme Court to issue that writ because of the proposed use of the word "accounting" in petitioner's proposed corporate name violated petitioner's First Amendment right to engage in truthful commercial speech.

Respectfully submitted,

/s/ Gerald J. Thain
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Attorney for Petitioner

March 19, 1990

APPENDIX

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IN THE SUPREME COURT OF TEXAS

NO. C-9157, MARGARET ANN DURAN vs. GEORGE S. BAYOUD, JR., SECRETARY OF STATE	)	November 8, 1989 Original Mandamus Proceeding

Relator's motion for leave to file petition for writ of mandamus filed herein on October 20, 1989, in the above numbered and entitled case having been duly considered, it is ordered that said motion for leave be, and hereby is, overruled.

It is further ordered that relator, Margaret Ann Duran, pay the costs incurred in this Court in this case.

* * *

I, JOHN T. ADAMS, CLERK of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the date shown.

WITNESS my hand and the Seal of the Supreme Court of Texas, at the City of Austin, this the 18th day of December, 1989.

JOHN T. ADAMS, CLERK

By Courtland Crocker,
Courtland Crocker,
Deputy Clerk

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No. C-9157

In the

Supreme Court For The State of Texas

Austin, Texas

MARGARET ANN DURAN,

Relator

vs.

GEORGE S. BAYOUD, JR.,
Secretary of State,

Respondent.

PETITION FOR WRIT OF MANDAMUS

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(915) 655-9662

State Bar No. 05208000

ATTORNEY FOR RELATOR

OCTOBER 19, 1989

NAMES OF PARTIES

Relator:

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1727 Childress
San Angelo, Texas 76901

Francis G. Culhane
103 South Irving, Suite 801
San Angelo, Texas 76903

Attorney for Relator

Respondent:

George S. Bayoud, Jr.
Secretary of State
PO Box 13697
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No. ___

IN THE SUPREME COURT OF TEXAS

MARGARET ANN DURAN,

Relator

vs.

GEORGE S. BAYOUD, JR., Secretary of State,

Respondent

MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS

To the Supreme Court of Texas:

Comes now relator, Margaret Ann Duran, a resident of the City of San Angelo, State of Texas, complaining of the following respondent: George S. Bayoud, Jr., Secretary of State and respectfully hereby moves this Honorable Court to grant to the relator leave to file her petition for the writ of mandamus, herewith tendered, said petition being hereby referred to and made a part of this motion

for all purposes. Accompanying this motion, relator herewith deposits with the clerk the sum of fifty dollars as costs and stands ready to deposit an additional sum, all as required by the Rule of the Court.

Relator prays that said petition for mandamus be filed and that the same be set down for hearing, and for relief, general and special.

Respectfully submitted,

/s/ Francis G. Culhane
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915/655-9662
ATTORNEY FOR RELATOR.

No. ___

IN THE SUPREME COURT OF TEXAS

MARGARET ANN DURAN,

Relator

vs.

GEORGE S. BAYOUD, JR., Secretary of State

Respondent

PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE SUPREME COURT OF TEXAS

Relator is Margaret Ann Duran, an adult resident of San Angelo, Tom Green County, Texas.

Respondent is George S. Bayoud, Jr., Secretary of State, State of Texas and he is the successor to Jack M. Rains, former Secretary of State.

Relator residence address is 1727 Childress Street, San Angelo, Texas 76901. Respondent George S. Bayoud, Jr., mailing address is PO Box 13697, Austin, Texas 78701 and his business office is located in the State Capitol Building, Room 127, Austin, Texas 78701.

At all material times Relator was and continues to be an adult resident of San Angelo, Tom Green County, and a citizen of the State of Texas and the United States of America.

George S. Bayoud, Jr. was appointed the Secretary of the State of Texas on June 19, 1989. The provisions of the Texas Statutes that apply to the Secretary of State and to

this fact situation are V.A.T.S. Bus. Corp. Act., Art. 3.01 et seq.

On June 15, 1988, Relator mailed duplicate originals of the Articles of Incorporation of Duran's Accounting & Tax Service, Inc. to Jack M. Rains, Respondent's predecessor, together with a cashier's check in the amount of $310.00 to cover the filing fee, franchise tax deposit, and charge for special handling (See attached exhibits A, B, C.).

On June 22, 1988 Relator received a reply dated June 20, 1988 from Respondent's predecessor, Jack M. Rains, Secretary of State, on which at the bottom was typed:

> "You cannot have accounting in your corporate name it implies an unlaw (sic) purpose for a business corporation."

Relator is a "single-parent" with substantial accounting experience who is attempting to establish an "accounting practice" in her hometown of San Angelo, Texas and she desires to establish that practice under the name of Duran's Accounting & Tax Service, Inc. It is obvious that the Secretary of State's restriction on the trade name, which truthfully describes her services, creates an irreconcilable conflict.

Although this refusal to grant a corporate charter to Relator did not specifically set forth a statutory provision or statutory ground, the Respondent's refusal is apparently based on the Public Accountancy Act 1979 Article 41a-1 Section 8.

The refusal of Respondent George S. Bayoud, Jr.'s predecessor, Jack M. Rains, to issue a corporate charter to Relator as applied for is contrary to and in violation of

several decisions by the United States Supreme Court. These decisions are in the area of commercial free speech and one recent leading decision is that of *Central Hudson vs. Public Utilities*, 447 US 557; 65 L.Ed, 2d 319.

Truthful commercial speech is accorded an intermediate level of First Amendment protection. *See, Virginia State Board of Pharmacy v. Virginia Consumer Council, supra*; Tribe *American Constitutional Law*, at 890-904 (2d.ed. 1988). Thus, restrictions such as the one involved here are subject to the four-prong test articulated in *Central Hudson Gas & Electric Corp. v. New York Public Service Commission*, 477 U.S. 557,566 (1980).

> For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries Yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

The State would argue that a non-licensees' use of the term "accounting" fails the first prong of the test; *i.e.*, that such speech is misleading, in that the term "accounting" connotes licensure as a public accountant. Careful analysis, however, suggests otherwise. Texas courts have defined "accountant" as follows:

> One engaged in rendering accounting or auditing service, as distinguished from bookkeeping, on a fee basis, per diem or otherwise, for more than one employer but *generally not possessing all the qualifications of education or experience required of a certified public accountant*; one who offers his

> services professionally [as an accountant] for pay to the general public.

Texas State Board of Public Accountancy v. Fulcher (I), 515 S.W.2d 950, 956 (Tex. Civ. App. – Corpus Christi 1974, writ ref'd n.r.e.). *citing* 1 C.J.S. Accountants at 636 (emphasis added). "Accounting," in turn, is defined by the American Institute of Certified Public Accountants as follows:

> [T]he act of recording, classifying and summarizing in a significant manner and in terms of money, transactions, and events which are, in part at least, of a financial character, and interpreting the results thereof.

Pyle, Larson and Hermanson, *Elementary Accounting* at 1 (1981). Thus anyone engaged in the foregoing activities is engaged in accounting; and anyone engaged in accounting on a fee basis for more than one employer may aptly be labeled an accountant. To that extent, a unlicensed accountant's use of the term accounting is not misleading at all; indeed, in light of the *Fulcher* definition a C.P.A.'s use of the designation "accountant", it could be argued, is more misleading than a non-licensee's use of the term.

Turning to the second and third prongs of the *Central Hudson* test, it is clear that the state has a substantial interest in preventing public confusion regarding licensed accountants. It is less clear, though, that the provision at hand directly advances that interest. Under the Board's interpretation of the Act, unlicensed accountants are left in a hopelessly awkward position: They may lawfully provide accounting services to the public, but apparently may not accurately describe their work. Consequently, the public is left in the dark as to the kinds of services

these individuals legitimately offer. This result does not advance the governmental objective of informing the populace.

Finally, we arrive at the fourth and final prong of the *Central Hudson* test, which demands an inquiry into whether the regulation is any more extensive than necessary to serve the asserted governmental interest. This test brings to light the Public Accountancy's Act most serious constitutional failing. As noted above, the State may not ban potentially misleading information if the information may be presented in a way that is not deceptive. Here, the State has given no consideration to less-restrictive alternatives; It has simply banned the information outright. Such a position flies in the face of well-established case-law – from *Virginia Pharmacy Board* to *Central Hudson*. The highest court of the state of Maryland, reviewing a provision almost identical to the one questioned here, commented:

> To prevent the possibility of public confusion and deception, the legislature cannot consistent with the First Amendment choose the most drastic remedy – the complete suppression of the use of certain words to describe the lawful activity of non-certified accountants. In these circumstances, 14(e)'s prohibition on a non-certified accountant's use of the words "accountant" and "accounting" is inconsistent with the rationale of *Virginia Pharmacy*.

Comprehensive Accounting Service Company v. Maryland State Board of Public Accountancy, 397 A.2d 1019, 1026-127 (Md. Ct. App. 1979). The Texas Public Accountancy Act, like the Maryland statute, unjustifiably imposes the most drastic remedy possible. Because less-restrictive measures

are readily available, the Texas act must be considered inconsistent with the First Amendment.

Texas courts have addressed this contention on two separate occasions. *See Texas State Board of Public Accountancy v. Fulcher,* 515 S.W.2d 950 (Tex.Civ.App. – Corpus Christi 1974, writ ref'd n.r.e.) (*"Fulcher I"*); *Fulcher vs. Texas State Board of Public Accountancy,* 571 S.W.2d 366 (Tex.Civ.App. – Corpus Christi 1978, writ ref'd n.r.e.) (*"Fulcher II"*). Both cases involved actions taken by the Board against W.L. Fulcher, an unlicensed accountant who held himself out to the public as an accountant in violation of Article 41 A-1. *Fulcher I* was decided two years prior to the birth of the commercial speech doctrine in *Virginia Pharmacy Board, supra.* Thus, the *Fulcher I* court did not find any constitutional principle violated by the Public Accountancy Act. *Fulcher II* was almost as inconclusive as its predecessor, despite the fact that the later case was decided two years *after Virginia Pharmacy.* In *Fulcher II,* Mr. Fulcher had failed to raise his constitutional claims at the trial level; thus, the appellate court found it unnecessary to reach the merits of the constitutional issue. 571 S.W.2d at 368-369.

In dicta, however, the *Fulcher II* court did offer its views on Mr. Fulcher's constitutional claims. The Court cited a California case for the proposition that "some usages of the term 'accounting' can mislead or deceive the public." 571 S.W.2d at 369-70. On that basis the Court summarily opined, "[W]e think *Virginia Pharmacy, supra,* and *Bates, supra,* do not control in this situation." 571 S.W.2d at 370.

For several reasons, *Fulcher II* does not control the present situation. First, the court's constitutional arguments were dicta; thus, even if the court had reached a completely contrary result on Mr. Fulcher's free speech claims, the Texas Supreme Court would still have found no reversible error.

Second, the *Fulcher II* court's constitutional arguments were based on an egregious misreading of *Bates v. State Bar of Arizona*, 433 U.S. 354 (1977) and was done without the benefit of the "fleshing out" of the commercial free speech doctrine done by the Supreme Court in recent years. In *Bates*, Arizona's state bar argued that attorney advertising is inherently misleading, and should therefore be suppressed. The Supreme Court, in language that is well worth repeating, rejected that argument:

> Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. *See, Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 769-770, 96 S.Ct. at 1829-1830. Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.

433 U.S. at 374-75. The message of *Bates* is clear: If the naivete of the public will cause advertising by unlicensed accountants to be misleading, then it is the Board of Public Accountancy's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective. The preferred remedy is *more disclosure*, rather than less. The *Fulcher II* court, however, simply disregarded that message.

The *Fulcher II* court also disregarded a more recent statement by the Supreme Court on commercial speech. In *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977), the Supreme Court voted 8-0 to strike down a township ordinance which banned "For Sale" and "Sold" signs from residential property. The court acknowledged that the ordinance served as an "important governmental objective," 431 U.S. at 94-95, but nonetheless decided that the Constitution forbade the particular means chosen to serve that objective:

> "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." [*Virginia Pharmacy Bd.*,] 425 U.S. at 770, 96 S.Ct. at 1829.
>
> Or as Mr. Justice Brandeis put it: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1972) (concurring opinion).

431 U.S. at 91. The *Fulcher II* court without explanation, ignored the "more speech" suggestion – and, for that matter, the entire opinion – of *Linmark Associates*.

In some sense, the mistakes of the *Fulcher II* court are understandable: The commercial speech doctrine was new at that time and although the Supreme Court's advances in the area have been clear, one might not expect every lower court to proceed apace. Now, however, ten years have passed since *Fulcher II*; and over that decade, courts have become more adept at assimilating commercial speech into the First Amendment. Professor Tribe recently noted that, "But, for a doctrine in its infancy, the 'commercial speech' doctrine has demonstrated remarkable vigor." Tribe, *American Constitutional Law* at 895 (2d.Ed. 1988). Supreme Court opinions since *Fulcher II* have placed special emphasis on the issue of "fit"; i.e., whether the challenged regulation is more extensive than necessary to serve the stated governmental purpose. *See, e.g., Zauderer v. Office Counsel*, 105 S.Ct. at 2278 (1985); *In re R.M.J.*, 455 U.S. at 203-04 (1982); *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. at 565 (1980).

If the import of *Virginia Pharmacy Board, Linmark Associates*, and *Bates* was unclear in 1978, it is certainly clear by now. When a certain type of information is potentially misleading, the state may require a disclaimer or explanation in advertising to "dissipate the possibility of consumer confusion or deception." *In re R.M.J.*, 455 U.S. at 201. The state may not, however, enforce a prophylactic ban on the information if the state's purpose in doing so could be served by less-restrictive means. The burden is on the state to explore those less-restrictive alternatives,

and to establish that they would be ineffectual. *Zauderer*, 105 S.Ct. at 2278-79; *In re R.M.J.*, 455 U.S. at 206; *Central Hudson*, 477 U.S. at 570.

As a final matter, neither the Public Accountancy Act nor *Fulcher II* purports to bar an unlicensed accountant from truthfully stating that he provides accounting services. Both the Act and the opinion focus on one's designation rather that on the general content of one's advertising. Thus, the State's position on this point – that a non-licensee may provide accounting services, but may not state publicly that he is doing so – is without foundation. The State is simply seeking to apply the statute as broadly as its imagination allows. The Constitution, thankfully, requires greater attentiveness to the public's legitimate interest in access to information.

Wherefore, Relator prays that a writ of mandamus be issued forthwith directing George S. Bayoud, Jr., Secretary of State to issue a corporate charter as applied for by Relator.

By: /s/ Francis G. Culhane
FRANCIS G. CULHANE,
#05208000
103 S. Irving, Suite 801
San Angelo, Texas 76903
915/655-9662
ATTORNEY FOR
RELATOR.

THE STATE OF TEXAS ::
::
COUNTY OF TOM GREEN ::

Before me the undersigned authority on this day personally appeared Francis G. Culhane, who being by

me first duly sworn did on his oath depose and say that he is of counsel in the above styled proceedings; that as such he is authorized to make this affidavit; that he has read the foregoing Petition for a Writ of Mandamus and the facts stated therein and the allegations therein made are true and correct; and further that he has been furnished originals of the attached three exhibits: Exhibit A, Articles of Incorporation; Exhibit B, cashier's check; Exhibit C, denial by the Secretary of State of the charter application of Margaret Ann Duran; and he verifies and certifies that these are true and correct copies of said originals.

/s/ Francis G. Culhane
FRANCIS G. CULHANE,
#05208000
103 S. Irving, Suite 801
San Angelo, Texas 76903
915/655-9662
ATTORNEY FOR RELATOR.

Subscribed and sworn to before me this 19th day of October, 1989.

/s/ Elaine A. Archut
Notary Public in and for
Tom Green County, Texas.

Elaine A. Archut
Notary Public
STATE OF TEXAS
My Comm. Exp. 12/08/90

CERTIFICATE OF SERVICE

A copy of this Motion for Leave to File a Petition for Mandamus and the Petition for Writ of Mandamus has

been sent addressed to George S. Bayoud, Jr., Secretary of State, State Capitol Building, Room 127, Austin, Texas 78701, Respondent, by Federal Express to Carol Hines, Prentice Hall Legal Services, 807 Brazos, Suite 600, Austin, Texas 78701, who is to hand deliver it to the Secretary of State's office in the State Capitol Building, Room 127.

This material left San Angelo, Texas on the 19th day of October, 1989.

/s/ Francis G. Culhane
FRANCIS G. CULHANE,
#05208000
103 S. Irving, Suite 801
San Angelo, Texas 76903
915/655-9662
ATTORNEY FOR RELATOR.

EXHIBIT "A-1"

MARGARET ANN DURAN
1727 Childress Street
San Angelo, Texas 76901
(915) 944-7059

June 15, 1988

SECRETARY OF STATE
Corporate Division
P. O. Box 13697
Austin, Texas 78711

Dear Sir:

Enclosed are duplicate originals of Articles of Incorporation for a business to be known as:

DURAN'S ACCOUNTING & TAX SERVICES, INC.

and a cashier's check on the Central National Bank, San Angelo, Texas. The cashier's check is in the amount of $310.00 and is intended to cover the filing fee, the franchise tax deposit, and the charge for special handling.

Very truly yours,

MARGARET ANN DURAN

mad

Enclosures

EXHIBIT A-2

ARTICLES OF INCORPORATION

OF

DURAN'S ACCOUNTING & TAX SERVICES, INC.

I, the undersigned natural person of the age of eighteen years or more, a citizen of the State of Texas, acting as incorporator of a corporation under the Texas Business

Corporations Act, do hereby adopt the following articles of incorporation.

ARTICLE ONE

The name of the corporation is DURAN'S ACCOUNTING & TAX SERVICES, INC.

ARTICLE TWO

The period of its duration is perpetual.

ARTICLE THREE

The purposes for which the corporation is organized are:

The transaction of any and all lawful business for which corporations may be incorporated under the Texas Business Corporation Act.

ARTICLE FOUR

The aggregate number of shares which the corporation shall have the authority to issue is one hundred thousand (100,000), each share at no par value.

ARTICLE FIVE

The corporation will not commence business until it has received for the issuance of its shares consideration of the value of $1,000.00 consisting of money, labor done or property actually received.

ARTICLE SIX

The address of the corporation's registered office is:

1727 Childress Street
San Angelo, Texas 76901

and the name of its registered agent at such address is:

MARGARET ANN DURAN

EXHIBIT A-3

ARTICLE SEVEN

The number of initial directors is one (1) and the name and address of the persons who are to serve as director until the first annual meeting of the shareholders, or until his or her successor is duly elected and qualified is as follows:

Margaret Ann Duran
1727 Childress Street
San Angelo, Texas 76901

ARTICLE EIGHT

The name and address of the incorporator is:

MARGARET ANN DURAN
1727 Childress Street
San Angelo, Texas 76901

IN WITNESS WHEREOF, I have hereunto set my hand this 15 day of June, 1988.

/s/ Margaret Ann Duran
Margaret Ann Duran,
Incorporator

THE STATE OF TEXAS ( )

COUNTY OF TOM GREEN ( )

I, the undersigned Notary Public, do hereby certify that on this the 15th day of June, 1988, personally appeared before me MARGARET ANN DURAN, who being duly sworn, declared that she is the person who executed the foregoing document as incorporator and the statements contained therein are true and correct.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this day and year before written.

/s/ C. Kay Hunt
Notary Public, State of Texas
Printed Name: C. Kay Hunt
My Commission Expires: 5-14-91

PURCHASER'S RECEIPT - RETAIN FOR YOUR RECORDS

dao

CASHIER'S CHECK

307452

REMITTER

Margaret Ann Duran

88-30/1113

PAYABLE TO SECRETARY OF STATE NOT NEGOTIABLE $ *310.00

The Central Bank
CENTRAL NATIONAL BANK
Area Code 915/655-0561
Post Office Box 1891
San Angelo, Texas 76902

MEMORANDUM

FOR

⑈307452⑈ ⑆113009031⑆ ⑈0009⑉202⑉9⑈

EXHIBIT B

A-23

EXHIBIT C-1

SEAL

OFFICE OF THE SECRETARY OF STATE

June 20, 1988

Return to: Secretary of State
Corporations Division
P.O. Box 13697
Austin, Texas 78711-3697
(512) 463-5583

Jack M. Rains
SECRETARY OF STATE
Margaret ann Duran
1727 Childress St.
San Angelo Tx 76901

RE: DURAN'S ACCOUNTING & TAX SERVICES, INC.

The following corrections are necessary for approval and filing of the documents submitted on behalf of the above named corporation.

THE DOCUMENT(S) AND CHECK(S) WHICH YOU SUBMITTED ARE ENCLOSED.

1. ___ The corporate name is not available because it is the same as, or deceptively similar to, that of an existing corporation named _____.

2. ___ The corporate name is available only with a letter consenting to use of a similar name from a corporation named _____.

3. ___ The above referenced name may be reserved upon receipt of a letter requesting reservation and a $25.00 filing fee.

4. ___ For a preliminary check on name availability before resubmitting your Articles, call (512) 463-5555.

5. ___ The corporate name must include one of the following words or abbreviations: COMPANY, CORPORATION, INCORPORATED, CO., CORP., INC.

6. ___ The Articles of Incorporation must set forth the term of existence of the corporation. The existence may be perpetual.

7. ___ The Articles of Incorporation must set forth the number of shares which the corporation shall have authority to issue, and the par value of the shares, or a statement that the shares are without par value.

8. ___ The Articles of Incorporation must state:

   "The corporation will not commence business until it has received for the issuance of shares consideration of the value of One Thousand Dollars ($1,000) consisting of money, labor done or property actually received."

9. ___ The Articles of Incorporation must include the street or building address for the registered office of the corporation. A post office box alone is not sufficient.

10. ___ The Articles of Incorporation must set forth the name of the registered agent for the corporation; the corporation may not serve as its own registered agent. The articles must indicate that the address of the registered agent is the same as the address of the registered office.

11. ___ The Articles of Incorporation must set forth the name(s) and address(es) of the initial director(s).

12. ___ The Articles of Incorporation must give the name(s) and address(es) of the incorporator(s).

*YOU CANNOT HAVE ACCOUNTING IN YOUR CORPORATE NAME, IT IMPLIES AN UNLAW PURPOSE FOR A BUSINESS CORPORATION

EXHIBIT C-2

13. ___ All incorporators must sign the Articles of Incorporation.

14. ___ An executed original and duplicate copy of the Articles of Incorporation must be submitted.

15. ___ Furnish $300 remittance in satisfaction of the $200 statutory filing fee and the $100 franchise tax prepayment.

16. ___ In addition to the $200 filing fee, the corporation must prepay an initial franchise tax deposit of $100 as a precondition to issuance of the certificate of incorporation.

17. ___ To elect close corporation status, the Articles of Incorporation should include the statement: "This corporation is a close corporation."

18. ___ The Articles of Incorporation should state the name(s) and address(es) of the person or persons who, pursuant to the shareholders' agreement, will perform the functions of the initial board of directors.

THE STATE OF TEXAS ::

COUNTY OF TOM GREEN ::

I, FRANCIS G. CULHANE, verify and certify that the above and foregoing, approximately a page and one-third, which is on the stationery of the Secretary of State, is a true and correct copy of the actual denial by the then Secretary of State, Jack M. Rains, of the charter application of Margaret Ann Duran.

/s/ Francis G. Culhane
FRANCIS G. CULHANE

Subscribed and sworn to before me this 19th day of October, 1989.

/s/ Elaine A. Archut
Notary Public in and for
Tom Green County, Texas.

Elaine A. Archut
Notary Public
STATE OF TEXAS
My Comm. Exp. 12/08/90
(SEAL)

LAW OFFICE OF
FRANCIS G. CULHANE
103 S. IRVING, SUITE 801
SAN ANGELO, TEXAS 76903

TELEPHONE 855-8882
AREA CODE 815

December 20, 1989

Gerald Thain, Dean
208 Law Building
University of Wisconsin Law School
Madison, WIsconsin 53706

RE: Margaret Ann Duran v. George S. Bayoud, Jr., Secretary of State C-9157

Dear Gerald,

Enclosed please find the certified copy of the order overruling the motion for leave to file petition for writ of mandamus in the Supreme Court of Texas. By this letter I am also sending copies of this same motion to the other individuals involved in this proceeding.

Please call me if you need any other information.

Sincerely,

/s/ Francis S. Culhane
Francis G. Culhane

FGC:kjf

cc: Bill Golden
1200 West Third Street
Roswell, NM 88201

Charles Seward
610 Gold Avenue, Ste 100
Albuquerque, NM 87102

William H. Sager
1010 N. Fairfax Street
Alexandria, VA 22314

Thomas Harrell, Jr.
P.O. Box 4847
Midland, TX 79704

PUBLIC ACCOUNTANCY ACT OF 1979, ARTICLE 41A-1 SECTION 8

Prohibition against practicing without permit

Sec. 8. (a) No person shall assume or use the title or designation "certified public accountant," or the abbreviation "C.P.A." or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such person is a certified public accountant, unless such person has received a certificate as a certified public accountant under Section 12 or Section 13 of this or prior Acts, holds a permit issued under Section 9 of this Act which is not revoked or suspended (hereinafter referred to as a "live permit"), and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 of this Act; provided, however, that an accountant of another state or foreign country who has registered under the provisions of Section 14 of the Public Accountancy Act of 1945, and who holds a live permit issued under Section 9 of this Act, may use the title under which he is generally known in his state or country, followed by the name of the state or country from which he received his certificate, license or degree.

(b) No partnership shall assume or use the title or designation "certified public accountant" or the abbreviation "C.P.A." or any other title, designation, words, letters, abbreviation, sign, card or device tending to indicate that such partnership is composed of certified public accountants unless such partnership is registered as a partnership of certified public accountants under Section 17 of the Public Accountancy Act of 1945, holds a live permit issued under Section 9 of this Act and all of such

partnership's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(c) No person shall assume or use the title or designation "public accountant" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such person is a public accountant, unless such person is registered as a public accountant under Section 11 or Section 13 of the Public Accountancy Act of 1945, holds a live permit issued under Section 9 of this Act and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof, or unless such person has received a certificate as a certified public accountant under Section 12 or Section 13 of this or prior Acts, holds a live permit issued under Section 9 of this Act and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(d) No partnership shall assume or use the title or designation "public accountants" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such partnership is composed of public accountants, unless such partnership is registered as a partnership of public accountants under Section 19 of the Public Accountancy Act of 1945, or as a partnership of certified public accountants under Section 17 of the Public Accountancy Act of 1945, and holds a live permit issued under Section 9 of this Act and all of such partnership's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(e) No person shall assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "licensed accountant," or any other title or designation likely to be confused with "certified public accountant" or "public accountant," or any of the abbreviations, "CA," "PA," "EA," "RA," or "LA," or similar abbreviations likely to be confused with "CPA"; provided, however, that only a person holding a live permit issued under Section 9 of this Act and all of whose offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof may hold himself out to the public as an "accountant" or "auditor" or combinations of said terms; and provided further, that a foreign accountant registered under Section 14 of the Public Accountancy Act of 1945, who holds a live permit issued under Section 9 of this Act and all of whose offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof, may use the title under which he is generally known in his state or country, followed by the name of the state or country from which he received his certificate, license or degree.

(f) No corporation shall assume or use the title or designation "certified public accountant," or "public accountant," nor shall any corporation assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "license accountant," "registered accountant," or any other title or designation likely to be confused with "certified public accountant" or "public accountant," or any of the abbreviations "CPA," "PA," "EA," "RA," or "LA", or similar abbreviations likely to be confused with "CPA." If a corporation

was registered under Section 10 of the Public Accountancy Act of 1945, prior to November 1, 1945, and holds a live permit under Section 9 hereof, it may use the same designations applicable to certified public accountants or public accountants hereinabove set out.

(g) No person shall sign or affix his name or any trade or assumed name used by him in his profession or business, with any wording indicating that he is an accountant or auditor, or with any wording indicating that he has expert knowledge in accounting or auditing, to any accounting or financial statement, or to any opinion on, report on or certificate to any accounting or financial statement, unless he has complied with the applicable provisions of this Act; provided, however, that the provisions of this Subsection shall not prohibit any officer, employee, partner, or principal of any organization from affixing his signature to any statement or report in reference to the financial affairs of said organization with any wording designating the position, title or office which he holds in said organization, nor shall the provisions of this Subsection prohibit any act of a public official or public employee in the performance of his duties as such.

(h) No person shall assume or use the title or designation "certified public accountant" or "public accountant" in conjunction with names indicating or implying that there is a partnership or in conjunction with the designation "and Company," or "and Co.," or a similar designation if, in any such case, there is in fact no bona fide partnership registered under Sections 17 or 19 of the Public Accountancy Act of 1945; provided that a partnership lawfully using such title or designation in conjunction with such names or designation on the effective date

of this Act, may continue to do so if it otherwise complies with the provisions of this Act.

NO. 89-1480

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

MARGARET ANN DURAN,
Petitioner,

v.

STATE OF TEXAS and GEORGE S. BAYOUD, JR.,
Secretary of State of the State of Texas,
Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

JIM MATTOX
Texas Attorney General

MARY F. KELLER
First Assistant
Attorney General

DAVID A. TALBOT, JR.
Special Assistant
Attorney General
Chief, Finance Division

EDNA RAMON BUTTS
Assistant Attorney General
Chief, Insurance, Banking
and Securities Section

*JAMES C. TODD
Assistant Attorney General
Chief, General Litigation
Division
P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2120

ON THE BRIEF:

SEDORA JEFFERSON
Assistant Attorney General

JENNIFER RIGGS
Assistant Attorney General

*Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Texas Supreme Court's refusal to consider Duran's mandamus petition to compel the Texas Secretary of State to issue Duran a corporate charter presents a federal question to invoke this Court's jurisdiction under 28 U.S.C. §1257(a).

2. Assuming jurisdiction is invoked pursuant to 28 U.S.C. §1257(a), whether this Court should refrain from exercising its discretionary review in light of the undeveloped posture of this case.

3. Whether the Texas Supreme Court's refusal to consider issuing a writ of mandamus to compel the Texas Secretary of State to issue a corporate charter under the name "Duran's Accounting and Tax Service" violates Duran's first amendment rights to commercial speech when Duran does not hold a license to practice public accountancy, a prerequisite to offering or providing accounting services to the public in Texas.

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NO. 89-1480

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

MARGARET ANN DURAN,
Petitioner,

v.

STATE OF TEXAS and GEORGE S. BAYOUD, JR., Secretary of State of the State of Texas,
Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

TO THE HONORABLE SUPREME COURT:

Respondents, the State of Texas and George S. Bayoud, Jr., Texas Secretary of State, file this their opposition to Margaret Ann Duran's ("Duran") petition for writ of certiorari, respectfully showing the Court as follows:

JURISDICTION

Respondents object to Duran's statement of jurisdiction. This Court does not have jurisdiction pursuant to 28 U.S.C. §1257(a) because the state court decision of which Duran seeks review does not involve a federal question.

STATUTORY PROVISIONS INVOLVED

I. *FEDERAL*

28 U.S.C.A. §1257(a) (West Supp. 1989).

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

II. *STATE*

Tex. Bus. Corp. Act. Ann. art. 9.04 (Vernon 1980).

> A. If the Secretary of State shall fail to approve any articles of incorporation, application for certificate of authority to transact business in this State, amendment, merger, consolidation, or dissolution, or any other document required by this Act to be approved by the Secretary of State before the same shall be filed in his office, he shall, within ten days after the delivery thereof to him, give written notice of his disapproval to the person or corporation, domestic or foreign, delivering the same, specifying in such notice the reasons therefor. From such disapproval such person or corporation may appeal to any dis-

> trict court of Travis County by filing with the clerk of such court a petition setting forth a copy of the articles or other document sought to be filed and a copy of the written disapproval thereof by the Secretary of State; whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper.
>
> B. Appeals from all final orders and judgments entered by the district court under this Article in review of any ruling or decision of the Secretary of State may be taken as in other civil actions.

Tex. Gov't. Code Ann. §22.002(c) (Vernon 1988).

> Only the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.

Tex. Rev. Civ. Stat. Ann. art. 41a-1, §8 (Vernon Supp. 1990). [See Appendix for full text of section 8 of statute].

STATEMENT OF THE CASE

Respondents agree with Duran's rendition of the procedural history of the case, with two exceptions. First, Duran inaccurately states that the Texas Supreme Court denied her petition for writ of mandamus by order dated November 8, 1989. The Texas Supreme Court's order de-

nied Duran's motion for leave *to file* the mandamus petition; it was not a ruling on the merits of said petition. Second, Duran also suggests that she was not notified of the Texas Supreme Court's decision until over a month later. In fact, the Texas Supreme Court sent Duran a letter advising her of the court's decision on the same day it ruled. (Respondents' Appendix, p. A-2).

With respect to the remainder of Duran's statement of the case, respondents note that the factual allegations generally conform to her pleadings below. Respondents would point out to the Court, however, that they were never afforded an opportunity to challenge the factual assertions, as this case was never before a trial tribunal.

SUMMARY OF ARGUMENT

The United State Supreme Court's jurisdiction has not been invoked under 28 U.S.C. §1257(a) because the final judgment from the Texas Supreme Court is based on purely state law grounds; it in no way draws a federal law in question. The Texas Supreme Court's judgment merely determined that it would not grant Duran permission to file an original mandamus proceeding in its court. This was totally proper because, under Texas law, Duran was not entitled to mandamus relief. This Court, therefore, lacks jurisdiction over Duran's petition for certiorari.

Assuming, *arguendo,* that this Court's jurisdiction has been invoked, then this Court should refrain from exercising such jurisdiction. The case in its present posture is totally undeveloped. The Texas courts have not had an opportunity to consider Duran's federal constitutional claims, nor have the respondents been afforded an opportunity to defend against such claims. Any consideration of the federal issue by the Court at this juncture would be repugnant to this Court's long-standing expressions of allowing State courts to interpret their statutes in the first instance.

Finally, the Texas Supreme Court's refusal to grant Duran's motion for leave to file petition for writ of mandamus did not violate Duran's rights under the first amendment to the United States Constitution. Because Duran does not hold a license to practice public accountancy under the Texas Public Accountancy Act, use of the term "accounting" in her corporate charter advertises an unlawful activity and is misleading to the public. In Texas, offering and providing accounting services for pay to the public constitutes the practice of public accounting. The state has a substantial interest in regulating the practice of public accountancy. The state has effected that interest directly and narrowly by prohibiting unlicensed individuals from using the term "accounting" in communications with the public.

ARGUMENT

I.

THIS COURT'S JURISDICTION UNDER 28 U.S.C. §1257(a) HAS NOT BEEN INVOKED BECAUSE THE TEXAS SUPREME COURT'S ORDER DENYING DURAN'S MOTION FOR LEAVE TO FILE MANDAMUS DOES NOT PRESENT A FEDERAL QUESTION.

Duran erroneously contends that this Court has jurisdiction under 28 U.S.C. §1257(a), which provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the ... validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or

> laws of the United States....

Id. The Texas Supreme Court's Order denying Duran's motion for leave to file petition for writ of mandamus was not a decision on the merits of her federal constitutional claim, but was a refusal to hear a matter that was not appropriate for mandamus. *See* Order of the Texas Supreme Court, Duran's Petition, Appendix, p. A-2. The Texas Supreme Court's decision, therefore, was based on purely state law grounds, not on grounds involving a federal question.

A. Final Judgments Predicated on State Law Procedural Defects Do Not Present Federal Questions for this Court's Review.

Two cases decided by this Court clearly establish that state court final judgments or decrees predicated on state law grounds do not present federal questions that trigger this Court's review authority. In *Newman v. Gates*, 204 U.S. 89 (1907), petitioners sought this Court's review of the Indiana Supreme Court's decision dismissing their state court appeal. This Court held that it lacked jurisdiction to review the Indiana Supreme Court's decision because, contrary to petitioners' assertion, the decision was not premised on the lower court's judgment, which involved a federal constitutional question, but was premised on procedural defects in the appeal itself. Specifically, a necessary party had not been included in the appeal as a party-appellant. In refusing to accept petitioners' case for review, this Court held:

> As the jurisdiction of this court to review the judgments or decree of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in the suit

> could be had, *and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.*

Id at 95 (emphasis added).

The same result obtained in *Hammerstein v. Superior Court of California*, 340 U.S. 622 (cause abated), 341 U.S. 491 (1951) (decision rendered). In *Hammerstein*, this Court held that it did not have jurisdiction to review the California Supreme Court's decision refusing to grant a writ of certiorari. Having determined that the California Supreme Court's decision was based on the petitioner's failure to utilize the proper channel of review, namely ordinary appeal, this Court held that the California Supreme Court's decision rested on independent state grounds, and the federal question in dispute in the lower court was not necessary to its decision. 341 U.S. at 493.

The analyses in *Newman* and *Hammerstein* apply here. Contrary to Duran's representations, the Texas Supreme Court never considered the merits of her mandamus petition; it only considered her motion for leave *to file* said petition. Permission was denied.

B. Duran Failed to Meet the Requirements for Mandamus Review Under Texas Law.

In Texas, as in most other states, a writ of mandamus will issue only to correct a clear violation of a duty imposed by law or a clear abuse of discretion. *Garcia v. Peeples*, 734 S.W.2d 343, 345 (Tex. 1987); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985); *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984). Mandamus is an extraordinary remedy that is available *only when no adequate remedy at law exits. Johnson v. Fourth*

Court of Appeals, 700 S.W.2d at 917. To obtain a writ of mandamus against the Secretary of State, Duran would have to show that she had a clear right to relief, that the Secretary of State had a clear duty to act, and that no other adequate remedy at law existed at the time the Secretary of State performed the action complained of. Duran failed to meet her burden.

1. Duran had an adequate remedy at law.

The Texas Business Corporation Act empowers the Secretary of State to administer said act. Tex. Bus. Corp. Act Ann. art. 1.01 *et seq.*, art. 9.03 (Vernon 1980) ("Act"). Article 9.04 of the Act provides in pertinent part:

> If the Secretary of State shall fail to approve any articles of incorporation, ... such person or corporation may appeal to any district court of Travis County by filing with the clerk of such court a petition setting forth a copy of the articles or other document sought to be filed and a copy of the written disapproval thereof by the Secretary of State; whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper.

Id. The above procedure was the appropriate method of review of the Secretary of State's decision on Duran's charter—not the extraordinary remedy of an original mandamus proceeding in the Texas Supreme Court.

Article 9.04 is conspicuously absent from Duran's petition to this Court. She relies instead on Tex. Gov't Code Ann. §22.002(c) (Vernon 1988) as authority for the propri-

ety of an original mandamus proceeding in the Texas Supreme Court. Section 22.002(c) of the Government Code, however, is a general provision authorizing original mandamus proceedings against *any* of the officers of the executive departments of the State of Texas. It is an established rule of statutory construction that a specific statute controls over a general statute. *See State v. Mauritz-Wells Co.*, 175 S.W.2d 238 (Tex. 1943). Section 22.002(c) of the Texas Government Code is a general provision; article 9.04 of the Act is a specific provision relating to the Secretary of State. Therefore, article 9.04 controls.

Additionally, the Bar Committee's comments to article 9.04 confirm that article 9.04 was Duran's appropriate method of review. The Committee stated: "This Article makes an important change in the Texas law. Under prior statues the remedy of a disappointed applicant against the Secretary of State lay in original mandamus proceedings in the Supreme Court." Tex. Bus. Corp. Act. Ann. 1955 Bar Comm. Comments to art. 9.04 (Vernon 1980).

Duran's case is distinguishable from *Gordon v. Lake*, 356 S.W.2d 138 (Tex. 1962), wherein the Texas Supreme Court held that article 9.04 did not apply to a trust charter applicant seeking incorporation pursuant to a statute that was *outside* the purview of the Texas Business Corporation Act. In that case, an original mandamus proceeding in the Texas Supreme Court was the appropriate remedy. In Duran's petition to this Court, Duran concedes that the Texas Business Corporation Act governs the Secretary of State's action with respect to her charter application. Therefore, there is no dispute that article 9.04 of the Act was her available method of review.

2. There was no clear duty upon the Texas Secretary of State to accept Duran's articles of incorporation.

A writ of mandamus will issue under Texas law

when a state official fails to observe a mandatory, legal obligation conferring a right or forbidding a particular action. *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985). In determining whether mandamus should issue, Texas courts must make an independent inquiry as to whether the state official's action is contrary to some clearly established legal duty. *Strake v. Court of Appeals for the First Supreme Judicial Dist. of Texas,* 704 S.W.2d 746, 747 (Tex. 1986).

Article 3.03 of Texas Business Corporation Act provides: "*If the Secretary of State finds that the articles of incorporation conform to law,* he shall, when all fees have been paid as required by law . . . . (3) Issue a certificate of incorporation to which he shall affix the copy." *Id.* (emphasis added). Article 3.03 imposes a duty upon the Secretary of State to issue a corporate charter only *after* he determines that the applicant's articles of incorporation conform to law. The determination of whether an applicant's articles of incorporation conform to law involves discretion. Therefore, mandamus is not an appropriate remedy to review such determinations.

Mandamus was further inappropriate because Duran was not complaining about the Secretary of State's action *per se,* but was in essence attempting to challenge the constitutionality of the Texas Public Accountancy Act of 1979, Tex. Rev. Civ. Stat. Ann. art. 41-1, §8 (Vernon Supp. 1990). Duran's right to challenge the constitutionality of a statute is at law, under the Texas Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. §37.001 *et seq*. (Vernon 1986). Section 37.006 of that act requires that the Texas Attorney General be served in such a suit, and no such service was made.

II.

ASSUMING THIS COURT HAS JURISDICTION UNDER 28 U.S.C. §1257(a), IT SHOULD REFRAIN FROM EXERCISING SUCH JURISDICTION PURSUANT TO ITS DISCRETIONARY AUTHORITY.

In *Hammerstein v. Superior Court of California,* 341 U.S. 491 (1957), this Court recognized that the presence of federal jurisdiction for a writ of certiorari does not automatically determine the exercise of that jurisdiction, because the issuance of the writ is discretionary. 341 U.S. at 493. Because of the undeveloped posture of this case, this Court should deny certiorari review.

Duran's case has not been considered on the merits by a single Texas court; it comes without the benefit of a trial record. No evidence has been presented by either side. A critical issue with respect to the merits of this case is whether the use of the term "accounting" by Duran in a trade name is misleading when Duran is not licensed to practice public accounting.

Established principles of comity, abstention and exhaustion of state judicial remedies counsel in favor of withholding the exercise of jurisdiction in this case. In *Pennzoil v. Texas*, 481 U.S. 1 (1987), this Court stressed the policy reasons behind those principles. The Court recognized that comity, which is the proper respect for state functions, was one of those reasons. 481 U.S. at 10. "Another important reason for abstention is to avoid unwarranted determination of federal constitutional questions." 481 U.S. at 11. This Court stated:

> When federal courts interpret state statutes in a way that raises federal constitutional questions, 'a constitutional

> determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time—thus essentially rendering a federal-court decision advisory and the litigation underlying it meaningless.'

481 U.S. at 11 [quoting *Moore v. Sims*, 442 U.S. 415 (1979)]. Further, in *Moore v. Sims*, this Court stated:

> States are the principal expositors of state law. Almost every constitutional challenge ... offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals.

442 U.S. at 430-31. As the above cases so eloquently state, the Texas state courts should be given an opportunity to determine the federal constitutional claim raised by Duran in the first instance.

Thus, even if it is determined that this Court has jurisdiction, the Court should refrain from exercising it in order to give the State judicial apparatus an opportunity to interpret its laws. It does not appear that Duran lost her right to *de novo* review in state district court. Thus, she cannot claim she had no other available remedy. Duran, of course, may raise her federal constitutional claim in state district court. *See e.g. City of Amarillo v. Hancock*, 238 S.W.2d 788, 790 (Tex. 1951) ("[D]ecisions of an administrative body may be attacked in court if they violate some

provisions of the state or Federal Constitution.") Hence, Duran can obtain complete relief in state court.

III.

THE TEXAS SUPREME COURT'S REFUSAL TO CONSIDER ISSUING A WRIT OF MANDAMUS TO COMPEL THE SECRETARY OF STATE TO ISSUE A CORPORATE CHARTER UNDER THE NAME "DURAN'S ACCOUNTING AND TAX SERVICE" DID NOT VIOLATE DURAN'S FIRST AMENDMENT RIGHTS TO COMMERCIAL SPEECH BECAUSE DURAN DOES NOT HOLD A LICENSE TO PRACTICE PUBLIC ACCOUNTANCY, A PREREQUISITE TO OFFERING OR PROVIDING ACCOUNTING SERVICES TO THE PUBLIC IN TEXAS.

Petitioner asserts that the Secretary of State's refusal to issue a corporate charter for "Duran's Accounting and Tax Service" to Duran, who admits that she is not licensed, violates Duran's first amendment rights to commercial speech. As a practical matter, however, Duran is not challenging the actions of the Secretary of State; she is challenging the constitutionality of section 8 of the Texas Public Accountancy Act of 1979, as amended, art. 41a-1, Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1990).

A. The First Amendment Does Not Protect Unlawful or Misleading Commercial Speech.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), this Court established a four-part test for determining whether the first amendment protects commercial speech. The first part of the test is whether the commercial speech falls under the first amendment at all. Advertising unlawful or

misleading activity is not protected. *See e.g., Friedman v. Rogers*, 440 U.S. 1 (1979) (upholding statute that prohibited practice of optometry under a trade name because trade names could be misleading to the public).

Duran attempts to analogize her case with those presented in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In those cases, this Court recognized that the free flow of commercial speech is vital to our free enterprise system. Those cases, however, dealt with the advertising of lower prices by licensed individuals or entities in situations in which no advertising had been allowed. At issue in *Virginia Pharmacy* was the validity of a Virginia law preventing pharmacies from advertising the prices of prescription drugs. *Bates* addressed the truthful advertising of the prices at which certain routine legal services were provided. Duran is advertising a service that individuals must be licensed to provide.

Article 41a-1, section 8(g), prohibits practicing public accountancy in Texas without a license from the Texas Board of Public Accountancy. Art. 41a-1, § 8. Duran admits that she is not licensed as a public accountant. Consequently, Duran's corporate name advertises an unlawful activity. The first amendment does not protect advertising unlawful activities. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (upholding ordinance prohibiting newspaper "help wanted" advertisements that were categorized by gender).

In *Texas State Board of Public Accountancy v. Fulcher*, 515 S.W.2d 950, 954 (Tex. Civ. App.—Corpus Christi, 1974, writ ref'd n.r.e.) ("Fulcher I"), the court stated:

> It is well settled that *accounting* is a highly skilled and technical profession that affects the public welfare, and

> which the state, in the exercise of its police power, may regulate.

515 S.W.2d at 954 (emphasis added). The *Fulcher I* court also stated that

> Appellee, *by offering and furnishing accounting services for pay to the general public* was engaged as an accountant in the practice of public accounting.

515 S.W.2d at 956 (emphasis added). Any person in Texas who advertises *or* provides accounting services for pay to the public is engaged in the practice of public accountancy and must have a license issued under the Public Accountancy Act.

Duran's argument is based on the premise that unlicensed individuals may practice accounting so long as they do not hold themselves out to the public as public accountants. In other words, she argues that if it is lawful to practice accounting, it cannot be misleading to advertise that one is practicing accounting. Apparently, Duran is relying on language in *Fulcher I* to the effect that the Public Accountancy Act "does not prohibit an unlicensed accountant from practicing accountancy or doing accounting work." 515 S.W.2d at 957. The Texas Board of Public Accountancy sought only to enjoin Fulcher from holding himself out as an "accountant," however, the language regarding the practice of accounting was dicta. Further, the *Fulcher I* court stated that offering or providing accounting services for pay *to the public* constitutes the practice of public accountancy. *Fulcher I*, 515 S.W.2d at 956. Duran is attempting to offer accounting services to the public, an activity that is unlawful without a license.

Moreover, the use of the word "accounting" by an unlicensed individual is inherently misleading, even if

that individual could legally practice accounting without a license. In *Fulcher v. Texas State Board of Public Accountancy*, 571 S.W.2d 366, 370 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.), ("Fulcher II") the court of appeals upheld the trial court's determination that an unlicensed individual's use of the term "accounting" is misleading because the term reflects the standard, accepted concept that providing accounting services to the public constitutes the practice of public accountancy. *See also Fulcher I,* 515 S.W.2d at 956. Both *Fulcher I* and *Fulcher II* recognized that the Texas Legislature had determined, as a matter of law, that the terms "accountant" or "accounting" by unlicensed individuals would cause confusion. *See Fulcher I,* 515 S.W.2d at 956; *Fulcher II,* 571 S.W.2d at 370.[1] Deference to the legislature in such cases is appropriate. *See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 344-45 (1986). Consequently, the first part of the *Central Hudson* test is not met; Duran's corporate name is not entitled to first amendment protection.

Duran relies on *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) and *Virginia Pharmacy Board v. Citizens Consumer Council,* 425 U.S. 478 (1976). This Court's decision in *Friedman v. Rogers,* 440 U.S. 1 (1979), is more on point than the cases relied on by Duran. In *Friedman v. Rogers*, this Court upheld a Texas statute that prohibited practicing optometry under a trade name because of the potential that trade names would mislead the public. The danger addressed by the statute at issue in that case was that the public might come to associate a certain quality of care from one optometrist with a trade name and be misled into believing that the same level of care would be provided by all individuals using the trade name.

The danger of misleading the public is greater in

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[1]Because Duran chose (improperly) to proceed by mandamus, no facts were developed. The Texas State Board of Public Accountancy has conducted surveys that support the state's position.

this case because the terms "accountant" and "accounting" have an established meaning for the public. Because the public identifies the terms with the practice of *public* accountancy, the public will be misled into believing that it will receive a higher level of service, i.e. the services of a licensed public accountant. The name "Duran's Accounting and Tax Service" advertises qualifications that Duran, an unlicensed individual, simply does not have.

B. The State Has a Substantial Interest in Regulating the Practice of Public Accountancy.

Assuming, *arguendo,* that petitioner may legally provide accounting services without a certificate and that use of the term "accounting" is not misleading, the second part of the *Central Hudson* test comes into play. The second question is whether the state's interest is substantial. 447 U.S. at 567. In *Fulcher I,* the court of appeals stated:

> [T]he need to protect the public against fraud [and] deception as the consequences of ignorance or incompetence in the practice of most professions makes regulation necessary.... Public accountancy now embraces many intricate and technical matters dealing with many kinds of tax laws, unfair trade practices, rate regulations, stock exchange regulations, reports required by many governmental agencies, financial statements and the like. So, in this view of the practice of public accounting, the public welfare of this State demands that it be regulated, as is done by Article 41a, V.A.C.S., as amended.

515 S.W.2d at 954-55. The *Fulcher I* court aptly expressed the State's substantial interest. *See also Friedman v.*

Rogers, 440 U.S. 1 (1979).

C. The State's Prohibition on Use of the Term "Accounting" by Unlicensed Individuals Directly and Narrowly Advances the State's Regulatory Interest.

The third part of the *Central Hudson* test is whether the state's regulation directly advances the government's interest in regulation. 447 U.S. at 567. The Public Accountancy Act does no more "than eliminate the exact source of evil it sought to remedy." *See City Council v. Taxpayers for Vincent,* 466 U.S. 789, 808 (1984) (upholding total ban on posting signs on public property). The prohibition on the use of the terms "accountant" and "accounting" is aimed directly at preventing public confusion and harm from reliance on an unlicensed individual. Even if the practice of accounting were legal, the probable public confusion would justify a ban on advertising. *See Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico,* 478 U.S. 328, 344-45 (1986).

The final part of the *Central Hudson* test is whether state regulation is only as broad as necessary to effect the state's interest in regulation. 447 U.S. at 567. The state has not prohibited all advertising by unlicensed individuals. Nor has the state prohibited advertising "tax service" or "bookkeeping service" although the public could believe that those services are provided traditionally by public accountants and could, therefore, be misled. The focus of the state's regulation is on the provision of accounting services to the public. *Fulcher I,* 515 S.W.2d at 956. The state's prohibition on the use of the terms "accountant" and "accounting" by unlicensed individuals is narrowly drawn to protect the public from the unlicensed practice of public accountancy and from confusion about what constitutes a "public accountant."

Arguably, the state could effect the same goal by

requiring an affirmative statement that the individual is unlicensed (e.g., "Not Board Certified"). Duran, however, did not attempt to register her trade name with such a disclaimer. Further, Duran would probably challenge such a requirement as more intrusive and broader than the mere prohibition on the use of the terms "accountant" or "accounting" by unlicensed individuals and entities.

Finally, when a statute prohibits holding out *and* practicing a profession without a license, a disclaimer that someone practicing without a license is not licensed does not excuse violation of the prohibition. *Clark v. Eads,* 165 S.W.2d 1019, 1023 (Tex. Civ. App.—Fort Worth 1942, writ ref'd) (unlicensed architects could not excuse practicing without a license simply by explaining to their clients that they had no license). Consequently, the state has chosen the narrowest possible way to prevent unlicensed individuals from advertising in a way that misleads the public into believing that they are licensed.

CONCLUSION

The fundamental flaw in Duran's petition for writ of certiorari is that she has no basis on which to invoke this Court's jurisdiction. The order of the Texas Supreme Court denying Duran leave to file an original mandamus proceeding did not involve a federal question. The order was based on independent state grounds, to wit: Duran had no right to mandamus relief under Texas law. Even, if we assume that this Court has jurisdiction, the long-standing prudential considerations of comity, abstention and exhaustion of state judicial remedies counsel in favor of declining certiorari review. Duran has an adequate remedy within the state's judicial apparatus to have her federal constitutional claim heard.

Finally, this Court should not grant Duran certiorari review because the Texas Supreme Court's refusal to grant Duran's motion for leave to file petition for writ of

mandamus did not violate her first amendment rights under the United States Constitution. Because petitioner does not hold a license issued under the Texas Public Accountancy Act, use of the term "accounting" in her corporate charter advertises an unlawful activity and is misleading to the public. The state has a substantial interest in regulating the practice of public accountancy, defined as offering and providing accounting services to the public. The state has effected that interest directly and narrowly by prohibiting unlicensed individuals from using the term "accounting."

In view of the foregoing, respondents pray that Duran's petition for writ of certiorari be denied in its entirety.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

I, James C. Todd, depose and say that I am attorney of record for Respondents herein, and that on April _____, 1990, pursuant to Rule 28, Rules of the Supreme Court, I served three (3) copies of the foregoing Respondents' Opposition to Petition for Writ of Certiorari on opposing counsel by U.S. mail in a duly addressed envelope, with first class postage prepaid, certified, return receipt requested to Gerald J. Thain, counsel of record for petitioner, at 215 Law Building, University of Wisconsin, Madison, Wisconsin 53706.

JAMES C. TODD

Subscribed and sworn to before me on the _____ of April, 1990.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

APPENDIX

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SUPREME COURT OF TEXAS
P.O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 8, 1989

Mr. Francis G. Culhane
103 S. Irving, Suite 801
San Angelo, TX 76903

RE: Case No. C-9157

STYLE: MARGARET ANN DURAN
v. GEORGE S. BAYOUD, JR., SECRETARY OF STATE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case.

Respectfully yours,

John T. Adams, Clerk

Original Signed by
Courtland Crocker, Deputy
By_____
Deputy

cc: Mr. George S. Bayoud, Jr.
Secretary of State
P. O. Box 13697
State Capitol Building, Room 127
Austin, Texas 78701

* * *

IN THE SUPREME COURT OF TEXAS

I, JOHN T. ADAMS, Clerk of the Supreme Court of Texas, as official custodian of the records of said Court, do hereby certify that the attached letter (copy) is a true and correct copy of the original of said letter mailed to the parties of record on November 8, 1989 as notification of the overruling of action on petition for writ of mandamus filed herein on October 20, 1989 in the Supreme Court of Texas, case number C-9157 and styled Margaret Ann Duran vs. George S. Bayoud, Jr., Secretary of Texas.

WITNESS my hand and seal of the Supreme Court of Texas,

at the City of Austin, this,
the 16th day of April 1990.

JOHN T. ADAMS, CLERK
SUPREME COURT OF TEXAS

By /s/
Peggy Littlefield
Chief Deputy Clerk

PUBLIC ACCOUNTANCY ACT OF 1979, ARTICLE 41a-1 SECTION 8

Sec. 8. Prohibition against practicing without license. (a) No person shall assume or use the title or designation "Certified Public Accountant," or the abbreviation "CPA" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such person is a certified public accountant, unless such person has received a certificate as a certified public accountant under this or prior Acts, holds a license issued under Section 9 of this Act which is not revoked or suspended and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 of this Act; provided, however, that an accountant of another state or foreign country who has registered under the provisions of this or prior Acts and who holds a license issued under Section 9 of this Act may use the title under which he is generally known in his state or country followed by the name of the state or country from which he received his certificate, license, or degree.

(b) No partnership shall assume or use the title or designation "Certified Public Accountant" or the abbreviation "CPA" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such partnership or corporation is composed of certified public accountants unless such partnership or corporation is registered as a partnership or corporation of certified public accountants under this or prior Acts, holds a license issued under Section 9 of this Act, and all of such partnership's or corporation's offices in this state for the practice of public accountancy are maintained and registered as required under Section 10 of this Act.

(c) No person shall assume or use the title or designation "Public Accountant" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to

indicate that such person is a public accountant, unless such person is registered as a public accountant under this or prior Acts, holds a license issued under Section 9 of this Act, and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 of this Act or unless such person has received a certificate as a certified public accountant under this or prior Acts, holds a license issued under Section 9 of this Act, and all of such person's offices in this state for the practice of public accountancy are maintained and registered as required under Section 10 of this Act.

(d) No partnership or corporation shall assume or use the title or designation "Public Accountants" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such partnership or corporation is composed of public accountants, unless such partnership or corporation is registered as a partnership or corporation of public accountants under this or prior Acts or as a partnership or corporation of certified public accountants under this or prior Acts, holds a license issued under Section 9 of this Act, and all of such partnership's or corporation's offices in this state for the practice of public accountancy are maintained and registered as required under Section 10 of this Act.

(e) No person shall assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "licensed accountant," or any other title or designation likely to be confused with "certified public accountant" or "public accountant," or any of the abbreviations, "CA," "PA," "EA," "RA," or "LA," or similar abbreviations likely to be confused with "CPA"; provided, however, that only a person holding a license issued under Section 9 of this Act and all of whose offices in this state for the practice of public accountancy are maintained and registered as required under Section 10 of this Act may hold himself out to the public as an "accountant" or "auditor" or any

combination of said terms; and provided further that a foreign accountant registered under this or prior Acts, who holds a license issued under Section 9 of this Act and all of whose offices in this state for the practice of public accountancy are maintained and registered as required under Section 10 of this Act, may use the title under which he is generally known in his state or country, followed by the name of the state or country from which he received his certificate, license, or degree.

(f) No person shall sign or affix his name or any trade or assumed name used by him in his profession or business with any wording indicating that he is an accountant or auditor or with any wording indicating that he has expert knowledge in accounting or auditing, to any accounting or financial statement, or to any opinion on, report on, or certificate to any accounting or financial statement, unless he has complied with the applicable provisions of this Act; provided, however, that the provisions of this subsection shall not prohibit any officer, employee, partner, or principal of any organization from affixing his signature to any statement or report in reference to the financial affairs of the organization with any wording designating the position, title, or office which he holds in said organization, nor shall the provisions of this subsection prohibit any act of a public official or public employee in the performance of his duties as such.

(g) No licensee shall assume or use a name which is misleading in any way as to the legal form of the firm or as to the persons who are partners, officers, or shareholders of the firm. The name or designation any partnership or corporation may assume or use shall contain the personal name or names of one or more individuals presently or previously members thereof, and the name or designation any individual may assume or use shall contain his name. No trade name or descriptive words indicating character or grade of service offered may be used or included except as authorized by rules promulgated by the board.

(h) No licensee shall assume or use the designation "and Company" or "and Associates" or abbreviations thereof in designating a firm in the practice of public accountancy unless there are at least two persons holding licenses under this Act involved in the practice of the firm.